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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 WESLEY LEROY KAMMERER and
12 DESIRE LYNN KAMMERER,

13 Plaintiffs,

14 v.

15 THE CITY OF VANCOUVER, et al.,

16 Defendants.

17 CASE NO. C07-5509BHS

18 ORDER GRANTING
19 DEFENDANTS' MOTION
20 FOR SUMMARY JUDGMENT
21 AND ORDER TO SHOW
22 CAUSE

23 This matter comes before the Court on Defendants' Motion for Summary
24 Judgment (Dkt. 57). The Court has considered the pleadings filed in support of and in
25 opposition to the motion and the remainder of the file and hereby grants the motion as to
26 Plaintiffs' claims under 42 U.S.C. § 1983 for the reasons stated herein.

27 **I. PROCEDURAL BACKGROUND**

28 On September 24, 2007, Plaintiffs Wesley Leroy Kammerer and Desire Lynn
Kammerer filed a complaint against Defendants City of Vancouver, City of Vancouver
Police Department, Officer Darren McShea, and Officer John Doe Nicholson. Dkt. 1.
Plaintiffs allege violations of their civil rights guaranteed by the Constitution, false arrest,
false imprisonment, assault, malicious prosecution, loss of consortium, outrage,
intentional infliction of emotional distress, negligent infliction of emotional distress,

1 negligent hiring of Officers McShea and Nicholson, negligent training of Officers
2 McShea and Nicholson, negligent supervision of Officers McShea and Nicholson, and
3 negligent retention of Officers McShea and Nicholson. *Id.*

4 On August 28, 2008, Plaintiff filed an Amended Complaint. Dkt. 36. On August
5 29, 2008, Defendants answered and asserted counter-claims under RCW 4.24.350, actions
6 for damages that are false, unfounded, malicious, and without probable cause. Dkt. 38 at
7 17.

8 On October 30, 2008, Defendants filed a motion for summary judgment. Dkt. 57.
9 Plaintiffs did not respond. On November 20, 2008, Defendants replied. Dkt. 68.

10 II. FACTUAL BACKGROUND

11 On July 31, 2005, Plaintiffs' son, Justin Kammerer, dialed 911 from a gas station
12 near Plaintiffs' residence. Dkt. 58, Daniel G. Lloyd ("Lloyd Decl."), Exh. 1 ("911
13 Transcript"). Justin told the dispatcher that he was "living in kind of an abusive
14 household where my mom likes to hit me, both, both me and my father." *Id.* at 2. Justin
15 also told the dispatcher that:

16 My dad has been put out of the house. She took his car keys after she
17 hit him in the face, and he just had a brain tumor removed less than three
months ago. He's 70 years old. He can't be doing this.

18 *Id.* at 3-4. The dispatcher informed Justin that someone would meet Justin at the gas
19 station. *Id.* at 4.

20 Officer McShea was dispatched to the gas station where Justin was waiting with a
21 family friend, Wayne Crowther. Dkt. 59, Declaration of Darren McShea ("McShea
22 Decl."), Exh A ("Police Report"). Officer McShea claims that Justin informed him that
23 Mrs. Kammerer had struck Mr. Kammerer with a shoe earlier that day and that she had
24 locked both Mr. Kammerer and him out of the house. *Id.* Officer McShea called for a
25 back-up unit and then they all went to Plaintiffs' residence. *Id.*

26 At the residence, Officer McShea discussed Justin's accusations with Plaintiffs.
27 Officer McShea claims that Mr. Kammerer told him that Mrs. Kammerer had hit him with
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1 a shoe on the right wrist earlier that day. *Id.* Officer McShea recorded that he observed a
2 fresh bruise developing on Mr. Kammerer's right wrist. *Id.* Mrs. Kammerer confirmed
3 that she had hit Mr. Kammerer and that she had locked both Mr. Kammerer and Justin out
4 of the house "until they could get their act together." *Id.* After these discussions, Officer
5 McShea arrested Mrs. Kammerer. *Id.*

6 III. DISCUSSION

7 A. Summary Judgment

8 Plaintiffs assert thirteen causes of action: (1) Deprivation of Civil Rights – Liberty,
9 pursuant to 42 U.S.C. § 1983; (2) Deprivation of Civil Rights – Property, pursuant to 42
10 U.S.C. § 1983; (3) Deprivation of Civil Rights – Free Speech, pursuant to 42 U.S.C. §
11 1983; (4) Deprivation of Civil Rights – Due Process, pursuant to 42 U.S.C. § 1983; (5)
12 Malicious Prosecution; (6) Loss of Consortium; (7) Outrage; (8) Intentional Infliction of
13 Emotional Distress; (9) Negligent Infliction of Emotional Distress; (10) Negligent Hiring
14 of Officers McShea and Nicholson; (11) Negligent Training of Officers McShea and
15 Nicholson; (12) Negligent Supervision of Officers McShea and Nicholson; and (13)
16 Negligent Retention of Officers McShea and Nicholson. Dkt. 36, ¶¶ 6.1-18.3.

17 Defendants moved for summary judgment and requested that all of Plaintiffs' claims be
18 dismissed. Dkt. 57 at 20. Plaintiffs neither responded nor opposed Defendants' motion
19 for summary judgment.

20 Under the Local Rules for the Western District of Washington, "[i]f a party fails to
21 file papers in opposition to a motion, such failure may be considered by the court as an
22 admission that the motion has merit." Local Rule CR 7(b)(2). After careful review of the
23 motion for summary judgment, the declarations and exhibits submitted in support of
24 summary judgment, and the remainder of the record, the Court grants Defendants' motion
25 for summary judgment as to Plaintiffs' claims under 42 U.S.C. § 1983.

1 **1. Standard**

2 Summary judgment is proper only if the pleadings, the discovery and disclosure
3 materials on file, and any affidavits show that there is no genuine issue as to any material
4 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
5 The moving party is entitled to judgment as a matter of law when the nonmoving party
6 fails to make a sufficient showing on an essential element of a claim in the case on which
7 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
8 (1985). There is no genuine issue of fact for trial where the record, taken as a whole,
9 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
10 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
11 present specific, significant probative evidence, not simply “some metaphysical doubt”).
12 See also Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if
13 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
14 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
15 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d
16 626, 630 (9th Cir. 1987).

17 The determination of the existence of a material fact is often a close question. The
18 Court must consider the substantive evidentiary burden that the nonmoving party must
19 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
20 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
21 issues of controversy in favor of the nonmoving party only when the facts specifically
22 attested by that party contradict facts specifically attested by the moving party. The
23 nonmoving party may not merely state that it will discredit the moving party’s evidence at
24 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*
25 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, nonspecific
26 statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan*
27 *v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

1 **2. Plaintiffs' Federal Claims Under 42 U.S.C. § 1983**

2 Defendants argue that Plaintiffs' § 1983 claims are confusing at best. Dkt. 57 at
3 10-11. Defendants assert that "a plain reading of the [complaint] reveals [Plaintiffs']
4 belief that [Mrs. Kammerer] was wrongfully arrested and [arrested] in retaliation for
5 exercising her free speech rights." *Id.* at 10. Defendants conclude that Plaintiffs' claims
6 are therefore based on the First and Fourth Amendments to the U.S. Constitution. *Id.* at
7 10-11. Defendants have advanced a logical conclusion based on Plaintiffs' complaint and
8 Plaintiffs have failed to either clarify their complaint or oppose Defendants' conclusion.
9 Therefore, the Court will consider Plaintiffs' federal claims to be based upon violations of
10 the First and Fourth Amendments.

11 **a. First Amendment Free Speech**

12 Plaintiffs' complaint suggests that Mrs. Kammerer's arrest on July 31, 2005, was
13 in retaliation of her exercising her free speech rights. *See* Dkt. 36 ¶¶ 5.112-5.113, 8.2.
14 "[T]he First Amendment prohibits government officials from subjecting an individual to
15 retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v.*
16 *Moore*, 547 U.S. 250, 256 (2006). "To demonstrate retaliation in violation of the First
17 Amendment, [a plaintiff] must ultimately prove first that [the officer] took action that
18 'would chill or silence a person of ordinary firmness from future First Amendment
19 activities.'" *Skoog v. County of Clackamas*, 469 F.3d 1221, 1231-32 (9th Cir. 2006)
20 (quoting *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir.
21 1999)).

22 In this case, Plaintiffs have failed to submit admissible evidence that Officer
23 McShea took action that would chill First Amendment activities. Plaintiffs allege that
24 "Defendants' conduct was in retaliation of Mrs. Kammerer's watch-dog attitude" in that
25 "Mrs. Kammerer has a history of being a critic of local police misconduct . . . and actively
26 reporting crimes." Dkt. 36 ¶¶ 5.112-5.113. Plaintiffs have failed to substantiate these
27 allegations with admissible evidence. Plaintiffs have also failed to explain how Mrs.

1 Kammerer's arrest for domestic violence would chill a person of ordinary firmness from
2 participating in First Amendment activities. Therefore, the Court grants Defendants'
3 motion for summary judgment on Plaintiffs' First Amendment claim under 42 U.S.C. §
4 1983.

5 **b. Fourth Amendment Unreasonable Search and Seizure**

6 A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth
7 Amendment, provided the arrest was without probable cause or other justification. *See*
8 *Larson v. Neimi*, 9 F.3d 1397, 1400 (9th Cir. 1993). Once a plaintiff shows that she was
9 arrested without a warrant, then the burden shifts to defendant "to provide some evidence
10 that the arresting officers had probable cause for a warrantless arrest." *Dubner v. City*
11 *and County of San Francisco*, 266 F.3d 959, 965 (9th Cir. 2001). It is undisputed that
12 Mrs. Kammerer was arrested without a warrant. Defendants, however, contend that
13 Officer McShea had probable cause to arrest Mrs. Kammerer. Dkt. 57 at 11-13.

14 "Under our traditional rule, probable cause exists when there is 'a fair probability
15 or substantial chance of criminal activity.'" *United States v. Brooks*, 367 F.3d 1128, 1134
16 (9th Cir. 2004) (quoting *United States v. Alaimalo*, 313 F.3d 1188, 1193 (9th Cir.2002)).
17 "[T]he determination of probable cause is based upon the totality of the circumstances
18 known to the officers at the time of the search." *United States v. Soriano*, 361 F.3d 494,
19 505 (9th Cir. 2004).

20 In this case, Defendants have shown that Officer McShea had probable cause to
21 arrest Mrs. Kammerer. Plaintiffs' son called 911 to report domestic abuse and he
22 personally told Officer McShea about the abuse. *See* 911 Transcript; McShea Decl. ¶ 2 &
23 Ex. A at 3. Moreover, Defendants have submitted admissible evidence that both Plaintiffs
24 confirmed that Mrs. Kammerer had struck Mr. Kammerer. *See* McShea Decl. Plaintiffs
25 have failed to either contest this evidence or submit contradictory evidence. Therefore,
26 the Court grants Defendants' motion for summary judgment on this claim because

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1 Plaintiffs have failed to establish material questions of fact regarding the issue of whether
2 Officer McShea had probable cause to arrest Mrs. Kammerer.

c. Remaining Defendants

4 Plaintiffs also sued the City of Vancouver and Officer Nicholson. *See* Dkt. 36. It
5 is undisputed that Officer Nicholson did not seize either Plaintiff. Officer Nicholson
6 claims that he was only at Plaintiffs' residence to provide back-up support for Officer
7 McShea. Dkt. 60, Declaration of Officer Dustin Nicholson, ¶¶ 2-3. Therefore, the Court
8 grants Defendants' motion for summary judgment to dismiss Plaintiffs' claims against
9 Officer Nicholson.

Municipal liability under § 1983 is absent if a plaintiff fails to prove that an officer violated his or her constitutional rights. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Gregory v. County of Maui*, 523 F.3d 1103, 1109 (9th Cir. 2008). In this case, Plaintiffs have failed to show that either Officer McShea or Officer Nicholson violated their constitutional rights. Therefore, the Court grants Defendants' motion for summary judgment to dismiss Plaintiffs' claims against the City of Vancouver.

B. Order to Show Cause

17 By this order, the Court dismisses all of Plaintiffs' claims that provided the basis
18 for federal jurisdiction, and does not reach the merits of Defendants' motion for summary
19 judgment on Plaintiffs' remaining claims under state law. The parties are ordered to show
20 cause, no later than December 11, 2008, why the Court should decline to exercise
21 jurisdiction over Plaintiffs' remaining state claims and Defendants' counterclaims and
22 dismiss this action in its entirety.

IV. ORDER

Therefore, it is hereby

25 **ORDERED** that Defendant's Motion for Summary Judgment (Dkt. 57) is
26 **GRANTED** as to Plaintiffs' federal claims. The parties may show cause, if any they

1 have, why this Court should decline to exercise supplemental jurisdiction and dismiss
2 Plaintiffs' remaining state law claims and Defendants' counterclaims.

DATED this 1st day of December, 2008.


BENJAMIN H. SETTLE
United States District Judge